STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT, DBA PLANNING AND ECONOMIC DEVELOPMENT,

Plaintiff-Appellant,

v

JAMES B. THOMAS,

Defendant / Counter Plaintiff / Appellee,

and

GLENN ARTHUR and CHANTY ARTHUR,

Defendants / Cross Defendants / Appellees

and

CITIBANK NA

Defendant / Cross Plaintiff / Appellee

and

CITIFINANCIAL NA

Defendant.

UNPUBLISHED
July 31, 2007

No. 274529
Wayne Circuit Court
LC No. 05-516334-CH

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right the October 30, 2006, Wayne Circuit Court's order granting summary disposition in favor of defendants in an action to quiet title. Plaintiff city sought to

quiet title in a single-family home within its limits, which property had been supposedly conveyed to defendant James B. Thomas by plaintiff's employee. Defendant Thomas then conveyed the property to defendants Glenn and Chanty Arthur, who purchased the property using a loan secured by a mortgage eventually held by defendant Citibank. We affirm.

I. Basic Facts and Procedure

This case arises from plaintiff's claim that it is the fee owner of property, a lot and residence at 15737 Birwood, in the City of Detroit, to which it received a deed on Oct. 3, 1994, from the State of Michigan. The state had earlier seized the property, which had suffered substantial fire damage in January, 1988, for failure to pay property taxes.

The issues in this case reach back to a 1997 complaint against plaintiff by various mortgagees ("1997 complaint").[1] In that case, the mortgagees had financed purchases by would-be homebuyers, who thought they were buying tax-forfeited property from the city. Instead, the complaint alleges, several city employees and non-employees were involved in a scheme using bogus documents to defraud the city and/or the would-be homeowners and lenders of sale proceeds by inducing the sales and then pocketing the money from the sales. Consequently, would-be homebuyers did not receive deeds prior to the mortgagees' complaint. Rather, as in the instant case, they and the lenders relied on representations and specious documents by those involved in the scheme that the deeds were forthcoming. The mortgagees in the 1997 complaint sought deeds from the city, inter alia, for the properties securing the loans. The then-defendant city counter claimed. Eventually, a settlement agreement was reached, and, in May, 1999, the trial court issued a consent judgment of dismissal. In pertinent part, the judgment reads:

> IT IS HEREBY ORDERED that the Complaint and the Cross-Complaint in the above-captioned cause of action, be dismissed without prejudice and without costs to any party, subject to the terms of the (settlement) agreement.
>
> IT IS FURTHER ORDERED that upon the execution and delivery of the Deeds . . . in recordable form to First American Title Insurance Co., the dismissal of the Complaint provided for herein shall be deemed to be with prejudice and without costs to any party.

The property at issue in the instant case was not part of the settlement agreement. Although the property was at issue in the 1997 complaint because defendant Citibank's predecessor, ContiMortgage, held the mortgage, the property was not mentioned in the agreement because, presumably, the loan used to buy the property was refinanced with a different lender before the agreement was reached.

The facts of the instant case are largely not in dispute. At about the same time the property was conveyed to the city, defendant Thomas read a newspaper advertisement or article listing vacant homes offered for sale by the U.S. Department of Housing and Urban Development. Thomas wanted to buy a home, refurbish it and sell it for profit. Thomas went to

[1] Wayne Circuit Court Case No. 97-740453 CH

one of the addresses listed in the newspaper where he unexpectedly met a man who identified himself to Thomas as Ralph Jones, whom Thomas believed was also working for himself and involved in real estate. Thomas said Jones gave him a list of houses owned by plaintiff. From that list, Thomas said he chose to go to the property at issue in this case. At some point shortly thereafter, Thomas and Jones met at the property, and Thomas was given three documents. The first document was labeled "Offer to Purchase." The second document, on plaintiff's letterhead, was labeled "Right of Entry to Property at '15737 Birwood.'" The third was labeled as "Addendum to Purchase Agreement lot 165." The documents contain a signature for "James Thomas," but Thomas stated the signatures are not his. At the time the documents were handed to him, Thomas said he believed he was buying the property for $1,000, which he attempted to pay for with two $500 money orders drawn from First of America Bank and made payable to plaintiff. Thomas said Jones promised the deed would be sent by mail when Jones took possession of the money orders; however, Thomas also stated that the deed never arrived and that he could not make subsequent contact with Jones. Nevertheless, Thomas proceeded to make repairs on the house, including demolishing and cleaning up debris, plumbing and electrical work and installing new carpet.

At the time the work was being completed, Thomas was married to defendant Glenn Arthur's stepdaughter. Thomas offered the house for sale to Arthur. Arthur said he accepted Thomas' offer because he had been living with his mother since discharging from the military and wanted a place of his own. Arthur said Thomas then introduced him to Arthur Taylor,[2] a mortgage broker based in Southfield, Michigan, whom Arthur said assured him he could buy the house despite having imperfect credit. Arthur said he had never purchased a home and put his trust in Taylor because he felt that being in the real estate office with Taylor demonstrated Taylor's knowledge about what Arthur needed to do to buy the house. Arthur further stated that during the time in Taylor's office, employees from Worldwide Finance brought him papers to sign, and Arthur understood that he was buying the house. Arthur then went to work on the house, moving into the home and beginning to perform additional repairs and renovation including a new furnace, drywall to cover the interior stucco finish, a load center to replace the fuse box and new windows. Arthur said he also had a new garage erected. Arthur said the repairs were financed by two refinancing loans he took out through different lenders. He and his wife lived in the house from 1996 to 2002, when they moved to Sterling Heights, Michigan.

Arthur said that in the first year he and his wife lived at the property, they never received a water bill or a property tax bill. He said he and his wife went to the City County Building in Detroit to find out the problem but could not get an answer. Arthur said approximately six months after seeking information from the county two FBI agents came to the house. Arthur said the agents showed him a list of homes sold illegally by Taylor. Arthur said he returned to the City County Building, was sent to another building and received confirmation about what the FBI agents told him. Arthur said he continued to make repairs and improvements on the house. Arthur said the agents returned after another six months and made statements, again, that he was not the legal owner of the house. He said he then contacted Thomas, who told him that he was still waiting for the deed. Arthur said that eventually the agents had him appear to testify in front

[2] A named defendant in the 1997 complaint.

of a grand jury, to which he testified to everything leading up to the time the agents contacted him.

In its opinion and order granting summary disposition, the trial court attempted to accurately summarize what happened to the property at issue here and those similar to it.

> In 1997 . . . several mortgage companies brought claims against the City and others, including Arthur Taylor, alleging that the City had a duty to issue deeds on various parcels of property. ContiMortgage,[3] which held a $41,250 interest in the Birwood property, was one of the plaintiffs in the action. ContiMortgage sought a deed with respect to the Birwood property. ContiMortgage and other plaintiffs eventually entered into a settlement agreement with the defendants, and a consent judgment of dismissal, *with prejudice*, was entered in the matter. The settlement agreement did not mention the Birwood property, purportedly because the Arthurs had refinanced and paid off the loan from ContiMortgage while the litigation was pending. [Emphasis added.]

Plaintiffs brought this action to quiet title in the property. In its complaint, plaintiff stated that, upon inquiry, Thomas produced the offer to purchase and related documents signed by Coleman. He also showed plaintiff copies of the money orders. Plaintiff contends, though, that it has no record of conveying the property, no record of receiving any money for the property from Coleman, that Thomas has no deed for the property, and that the money orders were never cashed and escheated to the state of Michigan. Further, plaintiff claimed below that ContiMortgage's discharge of the mortgage for the property as well as its discharge of a notice of lis pendens amounts to voluntary dismissal of the property from the 1997 complaint – rendering the settlement agreement void as to the property. Plaintiff valued the house at $75,200. Plaintiff further contended that, by ordinance, no sale of city-owned property is possible without approval from the city council, and that no such approval occurred for the property at issue. Plaintiff also stated that neither Thomas nor Lloyd D. Love, the last owner prior to the state, ever redeemed the property from the state of Michigan by paying the delinquent taxes. Following discovery, plaintiffs moved for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10). Defendants Thomas and the Arthurs responded that plaintiff's complaint to quiet title was barred by laches and that they were owed specific performance because the offer to purchase and the right of entry constituted a land contract. In its response to the motion, defendant Citibank also asserted laches as well as a defense of res judicata, based upon the settlement agreement in the 1997 complaint against plaintiff.

The trial court dismissed plaintiff's motion for summary disposition and granted defendants' summary disposition under MCR 2.116(I)(2), reasoning that the settlement agreement barred plaintiff's claim under the doctrine of res judicata. This appeal followed.

II. Analysis

[3] Defendant Citibank's predecessor in interest.

Plaintiff argues on appeal that the trial court erred by determining its claim is barred by res judicata because defendants are not privies with the plaintiffs in the 1997 complaint and settlement. Plaintiff also argues that because its charter bars transfer of city-owned property without certain official approval, that it is owed summary disposition as a matter of law. We disagree that defendants are not privies of the plaintiffs in the 1997 complaint. Further, while we agree that plaintiff here is correct in asserting its claim to the property under its charter, we find the point moot because plaintiff bound itself to the 1997 settlement, which by its terms bars plaintiff from asserting the claim.

1. Claim Barred By Res Judicata

This Court reviews de novo a trial court's decision on a motion for summary disposition. Equitable rulings to quiet title, as well as questions of law in general, are likewise reviewed de novo on appeal. *Richards v Tibaldi*, 272 Mich App 522, 528-529; 726 NW2d 770 (2006).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Tibaldi, supra*, at 530. Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). The burden of establishing the applicability of res judicata is on the party asserting it. *Id*.

A voluntary dismissal with prejudice constitutes a decision on the merits. *Limbach v Oakland County Rd Comm*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Consent judgments and default judgments constitute determinations on the merits, *Baraga County*, *supra*, at 456. The test to determine whether the two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata. *Adair v State*, 470 Mich 105, 123-124; 680 NW2d 386 (2004). If different facts or proofs would be required, res judicata does not apply. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 146; 715 NW2d 398 (2006). Res judicata bars litigation in the second action if those claims were actually litigated in the first action or of claims arising out of the same transaction, which the parties, exercising reasonable diligence, could have litigated but did not. *Adair, supra* at 121.

The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003). In *Peterson*, *supra* at 13, this Court stated:

> As to private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270, modified 431 Mich 898; 432 NW2d 171 (1988),

> after remand 211 Mich App 458; 536 NW2d 276 (1995). A privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession or purchase. *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 115; 448 NW2d 722 (1989). In order to find privity to exist between a party and non-party, Michigan courts require "both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee v Rogers*, 229 Mich App 547, 553-554, 582 NW2d 852 (1998).

In making its determination in this case that plaintiff's claim was barred by res judicata, the trial court concluded without analysis that ContiMortgage is defendant Citibank's "predecessor," and, as such, defendant Citibank is substantially identical to a party in the 1997 action by mortgagees against plaintiff. Further, the trial court determined that all of the other elements of res judicata applied, including that plaintiff could have pressed to resolve title to the disputed property in 1999 when the consent judgment was entered but did not bring suit until 2005.

On appeal, plaintiff argues that res judicata does not apply because Citibank is not a privy to ContiMortgage and that the property at issue was not part of the consent judgment. Plaintiff also argues, as it did below, that it had no duty to press a claim against defendants because it was the lawful owner in fee. We disagree.

In applying *Peterson* to the case at bar, we determine that the trial court was correct in concluding that defendant Citibank is a successor in interest to ContiMortgage and therefore is a privy. First, *Peterson* stands for the proposition that parties asserting res judicata do not have to be identical to prior parties – only that their interests are *substantially* identical. In this case, had ContiMortgage remained the mortgagee, then it would certainly be an identical party in the case at bar; moreover, it would have had a substantially identical interest as any successive mortgagee, here Citibank, i.e., perfecting its interest in the collateral property. Further, it was for the necessary benefit of the would-be homebuyers themselves that the 1997 complaint was brought, which makes their interests substantially identical to defendants Arthurs and Thomas. Second, *Peterson* concerns itself not as much with the alignment of interests as it does with whether the interests were "protected by the parties in the litigation." *Id*. In the 1997 case, ContiMortgage sought a deed from the defendant (here, plaintiff). It did so to resolve title to the property in dispute; however, the property was refinanced and supposedly voluntarily dismissed from the claim. Nonetheless, ContiMortgage was seeking to protect its security interest and for delivery of deeds to the would-be homebuyers, which are precisely the interests defendants here seek to protect. Further, Citibank took a mortgage from a prior lender, which itself took a mortgage from ContiMortgage; all of the mortgages were secured by the property at issue. Thus, there is a "substantial identity of interests and a working or functional relationship" between the lenders. *Peterson, supra*, at 13.

We also determine that the doctrine of res judicata applies here because all of the other elements are met: The consent judgment was dismissed with prejudice, and was therefore decided on the merits and a final decision. *Baraga County, supra*, at 456.

2. Plaintiff is Bound by the 1997 Settlement Agreement

Plaintiff also contends that, with respect to the property at issue here, its charter does not permit transfer of property without approval by the city council and, therefore, is entitled to judgment as a matter of law because defendants offered no showing of such approval. However, we find determine that plaintiff's point is moot because the terms of the settlement agreement bar plaintiff's claim. Specifically, ¶ 9 of the settlement agreement reads:

> The City hereby releases and forever discharges Plaintiffs, their . . . successors . . . from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, known or unknown, including without limitation arising out of or in any way related to the matters *which were raised or could have been raised in the Complaint*, or arising out of or relating in any way to the purchase or sale of any of the Properties. [Emphasis added.]

The title to the property at issue in this case was raised in the original complaint. Plaintiff here discharged ContiMortgage and its successors from defending against any action "of any kind or nature . . . known or unknown." Plaintiff here certainly knew of the property because it asserted its claim to title as a defense in the 1997 complaint. The consent judgment dismissed the case "subject to" the settlement agreement, regardless of the delivery of deeds. Moreover, ¶ 13 of the agreement reads, in pertinent part: "The undersigned further declare that the terms of this Agreement are contractual and not a mere recital, have been completely read and are fully understood and voluntarily accepted." Michigan courts construe and apply unambiguous contractual terms as written. *Rory v Continental Ins. Co.*, 473 Mich 457, 461; 703 NW2d 23 (2005). Therefore, even though the property at issue in this case was not a part of the settlement, the language of the settlement nonetheless applies to the property by its terms and bars plaintiff from asserting title to it.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood